



## ON - THE - JOB

Sherrie M. Hayashi, Editor-in-Chief

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### 2008 Legislative Update

By Alan Hennebold, Deputy Commissioner

**I**t's a wrap--the 2008 General Session of the Utah Legislature adjourned at midnight on Wednesday, March 5. In the course of the 45-day session, the Legislature enacted several bills that will have a significant effect on the Utah Labor Commission. Most of the Legislature's actions centered on the workers' compensation system, with important actions in other areas as well.

#### Workers' Compensation

At the Labor Commission's request, Senator Dimitrich sponsored **S.B. 58, *Workers' Compensation Related Amendments***. This bill accomplishes two objectives:

- S.B. 58 authorizes penalties against employers who fail to report workplace injuries to their insurance carriers and, instead, pay workers' compensation benefits directly to injured workers. This practice of paying benefits directly undermines the system for computing workers' compensation premiums. It also poses a risk that injured workers' claims won't be properly taken care of in the future.
- S.B. 58 also eliminates the Commission's Adjudication Division obligation to manage claims for workers' compensation dependents' benefits when there is no dispute between the parties. However, the Adjudication Division will remain available to resolve any disputes that do arise. The Division will no longer be involved in cases where there are no disputes.

**S.B. 159, "*Workers' Compensation Amendments*,"** sponsored by Senator Eastman, amends the Insurance Code and Workers'

Compensation Act to rename "policy waivers" (issued to businesses with no employees) as "coverage exclusions." S.B. 159 also establishes criteria that businesses must meet to obtain coverage waivers and allows the Commission to investigate and, if appropriate, terminate the waivers. Finally, S.B. 159 clarifies workers' compensation criminal fraud provisions.

Also of note, **S.B. 108, *Offset of Workers'***

***Compensation and Social Security***," sponsored by Senator Hickman, eliminates the offset of Social Security retirement cost-of-living increases against workers' compensation permanent total disability benefits.

Perhaps the most-discussed piece of workers' compensation legislation was Representative Morley's **Substitute H.B. 384, "*Employee and*** continued on page 2...

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***Employer Obligations Related To Workers' Compensation.*** H.B. 384 allows employers or their insurance carriers to request Commission approval to withhold temporary total disability compensation from injured worker who have been discharged from light-duty work for misconduct. H.B. 384 requires the Commission's Adjudication Division to decide these types of disputes within 45 days. A second aspect of H.B. 384 deals with claims for permanent total disability compensation by undocumented workers and individuals who are incarcerated. Under this new law, an injured worker's incarceration or undocumented status will not be considered for purposes of determining his or her preliminary entitlement to permanent total disability, but will be a part of the evaluation of the injured worker's ability to be reemployed.

**Antidiscrimination & Labor.** Senator Romero agreed to sponsor S.B. 60, "**Repealing Labor Commission Responsibilities to Oversee Employment Agencies**" at the Commission's request. This bill eliminates the Commission's duties regarding the regulation and licensing of employment agencies. The Commission viewed these requirements as unnecessary and burdensome, both for the Commission and for employment agencies.

Senator Hickman's **Substitute S.B. 81, "Illegal immigration,"** addresses many of the current issues regarding illegal immigration and undocumented workers. However, the effective date of this legislation has been postponed until July 1, 2009. Consequently, its provisions may be subject to further consideration and revision in the 2009 Legislative session.

**Coal Mine Safety.** In August 2007, six Utah coal miners died at the Crandall Canyon Mine and

three more Utahns died in rescue efforts. This prompted Governor Huntsman to appoint a Utah Mine Safety Commission to recommend improvements to the State of Utah's role in 1) coal mine safety; 2) accident prevention; and 3) accident response. **Substitute SB 224, "Utah Mine Safety Act,"** sponsored by Senator Dimitrich, provides a statutory framework for the Labor Commission to implement the Mine Safety Commission's recommendations.

Specifically, Substitute S.B. 24 establishes a new Office of Coal Mine Safety within the Labor Commission. This Office will coordinate state efforts to promote coal mine safety, with specific attention to:

- a system for individuals to report conditions in coal mines that may be dangerous, with protection against retaliation for individuals who make such reports;
- cooperation with educational organizations;
- coal miner certification and recertification programs;
- establishing a relationship with the federal Mine Health and Safety Administration to allow State participation in MSHA's regulation, inspection and plan approval systems; and
- development of emergency response and communication plans.

Substitute S.B. 224 also establishes a Coal Mine Technical Advisory Council that will bring together representatives of miners and the coal mining industry, academic experts, emergency service providers, and government representatives. The Council will apply its expertise to advise to the Labor Commission and the Legislature on ways to improve coal mine safety and accident response.

# Utah Office of Coal Mine Safety

**Toll-Free Number 1-888-9UT-MINE (988-6463)**

**Call our confidential hotline to report a mine safety condition that could cause a serious accident, injury, illness or fatality.**

## Wencor/Kitco Defense receives SHARP renewal

By Kate McNeil, Consultation Services Manager, Utah OSHA

**A**s Utah OSHA Consultation Services

continues to interface with small businesses throughout the state, it seems that the familiarity and appeal of its Safety and Health Achievement Recognition Program (SHARP) increases. SHARP is a special program that has been established to recognize small employers for workplace safety and health excellence.

Wencor/Kitco Defense is a small company based in Springville, Utah, who specializes in the distribution of parts for the support of commercial, as well as military, aircraft. In September 2006, this company achieved SHARP status, which represented a culmination of several months of hard work with a strong commitment from the company's management, as well as every associate in the facility.

In September of 2007, the company decided to continue this extraordinary commitment to worker safety and health and applied for a renewal of its SHARP status. Once again, in partnership with UOSH Consultation, Wencor/Kitco Defense invested significant time, effort and resources to demonstrate its continued commitment to protecting its employees. A solid, well



Wencor/Kitco management receives SHARP award from Louis Silva, UOSH Administrator (far right), and Comm. Hayashi (next to Silva)

**A solid, well established safety and health management system, along with a strong management team... has ensured the company's continued success in providing a safe and healthful workplace.**

established safety and health management system along with a strong management team, including the new Facilities

Manager, Clayton Thomas and Maintenance Manager, Bobby Waters, has ensured the company's continued success in providing a safe and healthful workplace. Formal recognition for this award was conducted on

March 7, 2008, at the company's corporate office in Springville, Utah.

To learn more about this company, please visit their website at

[www.wencor.com](http://www.wencor.com) For more information about the Utah OSHA SHARP program, please visit the Utah Labor Commission at: [www.laborcommission.utah.gov/UOSH/Consultation/URSharp/Sharp%20Program.html](http://www.laborcommission.utah.gov/UOSH/Consultation/URSharp/Sharp%20Program.html).



## Sexual Harassment: What is it and how can I stop it?

By Heather Morrison, Director, Antidiscrimination and Labor Division

**D**espite widespread efforts by government agencies, lawyers and good employers to prevent it, sexual harassment remains a significant problem in the workplace. For example, a Cornell Law Review article entitled “Exacerbating the Exasperated: Title VII Liability of Employers for Sexual Harassment” reported that between 40% to 90% of women in the American workforce have been the victims of some form of sexual harassment on the job. As even conservative Ninth Circuit Judge Kozinski recognized: “It is a sobering revelation that every woman—every woman—who has spent time in the workforce in the last two decades can tell at least one story about being the object of sexual harassment.”

So just what is sexual harassment, and how can you, as an employer, stop it?

Sexual harassment consists of unwelcomed and unwanted comments or conduct of an explicit sexual nature. The comments or conduct must be severe and/or pervasive. In other words, a single isolate incident—no matter how offensive—will likely not rise to the level of actionable harassment; neither will a series of incidents which the average reasonable person would not find offensive. Why use an “average reasonable *person*” standard? Men and women clearly view sexual harassment differently. A recent telephone survey of 1,000 men and women in Los Angeles found that 67% of men said they would be complimented if they were propositioned by a woman at work, while only 17% of women said they would feel the same way.

There are a number of steps that you can take to reduce the risk of sexual harassment occurring in your workplace. The first thing you should do is

adopt and disseminate a clear sexual harassment policy which not only defines sexual harassment, but also gives employees several avenues to complain: supervisors, human resources, a hotline, etc. Keep in mind that if you have

employees who do not understand or read English, that you should, at a minimum, provide them with the policy in their native language. You should also conduct periodic sexual harassment training to make sure your employees understand what sexual harassment is and to let them know that you take it very seriously and that it



**Because the harassment of teenagers in the workplace is a pervasive problem that's long existed under the radar, the ...Division has launched an educational effort to teach high school students throughout Utah about their rights and obligations under State and Federal discrimination laws.**

simply will not be tolerated in your workplace. Take all complaints of sexual harassment seriously; make sure you do a thorough and timely investigation of all complaints you receive, and follow-up appropriately with the parties involved. And finally, remember that retaliation for complaining about sexual harassment is just as illegal as the sexual harassment itself.

Because the harassment of teenagers in the workplace is a pervasive problem that's long

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## Commissioner Hayashi appoints new Industrial Accidents director

By Robyn Barkdull, Public Information Officer

Commissioner Sherrie Hayashi of the Utah Labor Commission announced the appointment of Larry D. Bunkall as the Director of the Industrial Accidents Division for the Labor Commission. The Industrial Accidents Division is responsible for the administration of the Workers' Compensation Act which provides medical care and lost wages to injured workers in exchange for employer immunity from personal injury lawsuits by their employees. Mr. Bunkall will fill the position vacated by Joyce Sewell following her recent retirement.



Larry Bunkall holds both a BS degree from the University of Utah and a master's degree in Adult Education Administration from Brigham Young University. He joins the Commission following employment with Kennecott Utah Copper/Rio Tinto as Assistant Director of Government and External Affairs. He has also been past President of the Utah Manufacturers' Association and Vice President of the Utah Retail Grocers' Association.

Mr. Bunkall is a past member of the Workers' Compensation Advisory Council and has served on numerous task forces and study committees throughout the years addressing labor issues,

workplace safety, and the workers' compensation system.

"The Labor Commission feels privileged to have someone of Larry's qualifications and capabilities accept this demanding position", stated Commissioner Hayashi. "He has a great understanding of the workers' compensation system, as well as vast experience in the workings of government and the promotion of workplace safety statewide. He will bring great leadership and balance to the oversight of the Division."

"We are committed to providing fair and efficient services to all parties involved in workplace injuries," said Mr. Bunkall. "With the charge to monitor and administer workers' compensation in the State of Utah, the Industrial Accidents Division is focused on resolving injured workers' claim disputes and ensuring all businesses have workers' compensation coverage for their employees."

Larry Bunkall will oversee the divisions' 17 employees whose mission it is to monitor

and assist in the prompt payment of compensation to injured workers and their return to the workplace.

"He (Bunkall) has a great understanding of the workers' compensation system, as well as vast experience in the workings of government and the promotion of workplace safety statewide. He will bring great leadership and balance to the oversight of the Division."

## Appellate Decisions

**D**uring the last three months, Utah's appellate courts have issued two decisions on appeals from Labor Commission decisions—both arising out of workers' compensation cases. The court's decisions are summarized below, but can be read in full at [www.utcourts.gov/courts/appell/](http://www.utcourts.gov/courts/appell/).

***Duran v. Labor Commission, et al.*, (2008 UT App 112, issued April 3, 2008).** Ms. Duran's claim for workers' compensation benefits was scheduled for hearing in St. George. Ms. Duran attempted to withdraw her claim by faxing a letter to the ALJ the afternoon before the hearing. Ms. Duran then failed to appear for the hearing.



The ALJ declined to accept Ms. Duran's purported withdrawal of her claim. Instead, the ALJ entered Ms. Duran's default for failure to appear at the hearing and then accepted evidence from the employer. Based on this evidence, the ALJ concluded Ms. Duran was not entitled to benefits.

Ms. Duran requested relief from default. The ALJ denied that request. Ms. Duran then requested review by the Labor Commission's Appeals Board. In her motion for review, Ms. Duran argued that: 1) She had an unconditional right to withdraw her application at any time prior to the hearing; 2) The ALJ's failure to immediately respond to her letter purporting to withdraw her claim had misled her into believing she need not appear at the hearing; and 3) if the ALJ was correct in dismissing her claim, it should only have been dismissed "without prejudice."

The Appeals Board rejected each of Ms. Duran's arguments and upheld the ALJ's decision. Ms. Duran then sought review by the Utah Court of Appeals. The Court of Appeals held that Ms. Duran's "attempt to withdraw her application for a hearing at the eleventh-hour" was ineffective and that the ALJ acted correctly in proceeding with the hearing on the merits of Ms. Duran's claim.

***Casper v. Labor Commission, et al.*, (2008 UT App 103--unpublished memorandum decision).** Mr. Barraclough suffered a fatal heart attack while driving truck for Andrus Trucking. Ms. Casper, Mr. Barraclough's widow, claimed workers' compensation dependents benefits from Andrus and its insurance company on the theory that her husband's heart attack was caused by the stresses and strains of his employment. The Commission concluded that Mr. Barraclough's work was not the medical cause of his heart attack and, on that basis, denied Ms. Casper's claim. Ms. Casper then sought review of the Commission's decision by the Utah Court of Appeals. The Court of Appeals affirmed the Commission's decision.

The Court rejected Ms. Casper's argument that the Commission should have imposed sanctions under the Utah Rules of Civil Procedure against Andrus for its untimely responses to Ms. Casper's discovery requests. Instead, the Court noted that process for adjudicating workers' compensation claims does not require a strict application of the discovery rules established by the Rules of Civil Procedure. The Court also rejected Ms. Casper's argument that the Commission erred in finding that Mr. Barraclough's work did not cause his heart attack. On this point, the Court of Appeals held that the Commission is the ultimate fact finder in the workers' compensation cases and that the Court will not substitute its opinion of the facts for that of the Commission.

**Also note:** The Utah Supreme Court has agreed to review the following issues.

- In a case involving permanent total disability compensation: 1) whether the Court of Appeals applied the correct standard of review to the Commission's decision; and 2) whether the Commission acted within its authority in promulgating

Rule 612-1-10-D.1. (*LPI Services v. Labor Commission*) Whether the term “compensation,” as employed by § 34A-3-110 of the Utah Occupational Disease Act, includes payments for medical expenses. (*Ameritech Library Services v. Labor Commission*)

- Whether § 34A-2-413(5) of the Utah Workers’ Compensation Act, which

provides for an offset of social security retirement benefits against workers’ compensation permanent total disability benefits, violate the Equal Protection Clauses of the Utah and U.S. Constitutions by discriminating on the basis of age. (*Merrill v. Labor Commission*)

## The Rules Corner

Pursuant to authority granted by the Utah Legislature, the Commission has recently adopted or is considering the following substantive rules. If you have questions or concerns about any of these rules, please call the Labor Commission at 801-530-6953.



<b>Rule 610-1-3. Adjudication</b>	<b>Attorney’s Fees in Workers’ Compensation Cases.</b> Increases caps and percentages for attorneys’ fees. Also clarifies recoverable costs.	Effective February 7, 2008.
<b>Rule 602-3. Adjudication</b>	<b>Assignment of benefits.</b> Technical amendment that requires notice of proposed assignment to owners of annuity contracts.	Effective February 7, 2008.
<b>R610-2-6 and R610-3-4 Antidiscrimination &amp; Labor</b>	<b>Wage Claims and Employment of Minors.</b> Removes requirement that claims be notarized. Also allows filing of claims by representatives.	Effective March 24, 2008.
<b>R610-1-4 Antidiscrimination &amp; Labor</b>	<b>Minimum Wage.</b> Clarifies application of minimum wage requirements to tipped employees. Also addresses tip-pooling arrangements.	Endorsed by Advisory Council; discussed at Public Meeting on March 12, 2008.
<b>R610-3-10 Antidiscrimination &amp; Labor</b>	<b>Attorneys Fees.</b> Conforms existing rule to statutory provisions by removing provision from rule that purports to allow awards of attorneys fees to private counsel in wage claim proceedings..	Discussed at Public Meeting on April 2, 2008
<b>R612-2-5 Industrial Accidents</b>	<b>Regulation of Medical Fees.</b> Increases some conversion factors under the Commission’s Medical Fee Guidelines for medical care rendered for a work-related injury or illness.	Endorsed by Advisory Council; discussed at Open Public meeting on April 2, 2008.
<b>R614-1-4 UOSH</b>	<b>Personal protective equipment.</b> If personal protective equipment is required under existing safety standards, this proposed rule requires employers to pay for the equipment.	Discussed at Open Public meeting on March 19, 2008.
<b>R616-3-3 Boiler &amp; Elevator</b>	<b>Elevator standards.</b> Adopts amended ASME code, with new provision allowing performance-based approval of new elevator designs.	Effective March 24, 2008

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**Sexual Harassment**

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existed under the radar, the Utah Antidiscrimination & Labor Division has launched an educational effort to teach high schools students throughout Utah about their rights and obligations under State and Federal discrimination laws. So far, the Division has conducted training for more than 100 students, and has additional training planned for more than that in the upcoming month. The Division hopes that by letting young workers, who are often in their first jobs, know what their rights are, fewer of them will become victims of unlawful harassment.

For more information about sexual harassment and discrimination, or to request that the Division conduct training in your workplace, please visit our website:

<http://www.laborcommission.utah.gov/AntidiscriminationandLabor/index.html>.

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